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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. HECTOR LOPEZ, Defendant and Appellant.	B168755 (Los Angeles County Super. Ct. No. BA242150)

APPEAL from a judgment of the Superior Court of Los Angeles County. Maureen Duffy-Lewis, Judge. Affirmed in part and reversed in part.

George O. Benton, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez Supervising Deputy Attorney General, and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, appellant Hector Lopez was convicted of one count of the attempted murder of Abel Martinez and one count of the lesser offense of attempted voluntary manslaughter of Jaime Garcia.[1] The jury found true allegations that the attempted murder of Martinez was willful, deliberate and premeditated; that appellant personally inflicted great bodily injury; and that a principal had personally used a firearm, inflicted great bodily injury, and committed the offense for the benefit of a criminal street gang. (Pen. Code, §§ 664(a)/1192.7(c), 12022.7(a), 12022.53(b), 12022.53(d), 12022.53(c), 186.22(b)(1).) As to count 2, the jury found appellant personally used a firearm and that the offense was committed for the benefit of a criminal street gang. (Pen. Code, §§ 12022.5, 186.22(b)(1).)

The People concede prejudicial instructional error regarding count 2, the attempted voluntary manslaughter, and we shall reverse as to that count. Concluding that the trial court did not coerce a juror and properly dismissed her when she called in sick, we shall affirm the judgment of conviction on count 1 and related allegations.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Jury voir dire[2]

The jurors were chosen and sworn on April 21, 2003. Before testimony began on April 22, juror No. 1, a registered nurse who worked a Children's Hospital, expressed reluctance to serve on the jury. She told the court she had called Colombia that morning to wish her niece a happy birthday and found her family, to whom she had been sending $500 per month, was in need of more money and could actually lose their house; she did

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[1] The four initial counts charged were all attempted murder. Two of those counts were dismissed on the prosecution's motion, after the jury was sworn and before opening statement. Count 3, with Jaime Garcia as the victim, became count 2 or alternatively was referred to as count 3.

[2] One of the issues raised on appeal relates to the trial court's interaction with Juror number 1 during the deliberations process. We therefore set forth information regarding that juror at the outset of trial and during deliberations.

not think she could both serve on the jury and work to send them money. If she worked night shift, she told the court she would be sleepy in court. She understood that being a juror was her obligation as a citizen. The court stated: "I hate to say it but in the here and now I don't hear good cause unless counsel want to stipulate." The prosecutor offered to stipulate, but defense counsel would not, so the court would not release her and suggested she try to get weekend work.[3]

Evidence of guilt

A few days before the shooting, appellant tried to enroll in the continuation school where he had been enrolled several times. He was not allowed in the school.

Either the morning of the shooting or the day before, appellant drove by the continuation school and had a verbal confrontation with Abel Martinez. Martinez got tired of arguing with the occupants and spit at the car. The two were from rival gangs, and appellant later returned to the school, asked about gang affiliation, and shot at Martinez and Jaime Garcia. Someone with appellant also started shooting. Martinez suffered shots to his upper body, legs and arm. When he fell to the ground, he said he was going to kill appellant. The two assailants then ran away.

Appellant was identified by a young Black woman student at the school,16 years old at the time of the shooting, who was walking with Martinez during both incidents.[4] She saw appellant shoot Martinez; when the shooting occurred, she ran and hid. She testified appellant was the passenger in the car the day before the shooting and she was sure he was the shooter. She testified she identified him in a street lineup soon after the

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[3] The juror reiterated: "I need to work the night shift, then. . . . I know I going to be sleepy." When the court told her that a lot of jurors work night shifts and come in during the day, assuring her it was "going to be a very quick trial," the juror replied "I understand that; but if I work the night shift and I come here, I'm not going to do a proper job." Again the trial court found no good cause to excuse her, and the juror replied "I don't have anybody to support me."

[4] She has since returned to Louisiana and had relocated twice since the shooting.

shooting[5] and also picked them out of a six-pack photo show-up.[6] The witness had never seen him before the spitting incident; victim Martinez told her appellant's name.

Jaime Garcia, the second victim, was in custody at the time of trial and testified he was with Abel "and a girl" the day of the shooting. The shooter said he was from 38th Street gang; Martinez was from Playboys. Seven or eight shots were fired, and Garcia ran as he saw Abel Martinez fall down. Garcia identified appellant in a six-pack three days after the shooting as the driver and "the person that was driving the car and shot at me" and at a previous hearing but made no identification at trial.

The school secretary who had seen appellant a few days before also heard the argument the day of the shooting and asked appellant to leave. She saw gang signs being

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5 The street lineup was a surprise to both the prosecution and the defense. Appellant apparently was not in any such lineup. The court, concerned about any delay in the trial to find the officers who conducted any such field show-up with appellant, stated "I don't want to run over the trial. We have already have jurors who want to leave." The prosecutor added: "Juror Number 1 is still looking away and not even paying attention and not looking up. I wanted to say I have serious concerns about her." The court replied: "I can't say that she's not been listening. She is sitting passively. I can tell she's very unhappy about being on the jury." The court asked defense counsel if he still wanted her on the jury; even understanding how unhappy she was, defense counsel stated his client wanted to keep her. Told one never knows how an unhappy person is going to react, defense counsel replied "We're rolling the dice on that one." The prosecutor added: "She hasn't even looked up. Even if she was paying attention, she doesn't look up. I've watched her from the beginning of the trial." The court replied "I can't say she's not doing her job," to which the prosecutor stated "She's not. If she's not looking at the evidence, she's obviously missing 60 percent." The court responded "I can't say that she's never looked up at any of the charts or anything." The prosecutor asked the court to "keep a lookout to see" and defense counsel/the court added: "If she really is that bad, we are going to hear about it from the other jurors. They'll send out a note saying that she's not talking or deliberating. We'll hear about it."

As for the witness's testimony about a field identification, the People conceded there was no such lineup involving appellant. The defense used her confusion on this issue and others to discredit her identification of appellant as the shooter.

6 At trial, she did not recall if appellant said anything like "Fuck Playboys."

thrown from both sides, Playboys and 38th Street. Moreover, she identified appellant in a six-pack as the person trying to enroll who had had confrontations with her students.

No fingerprints were recovered from the casings found in the area. Soon after the shooting, Officer Trevino was directed to an apartment and heard an occupant state "They busted on this peanut," gang slang for Playboy, the victim's gang.[7] He recovered drugs and loaded guns at the location. The officers took five of the occupants outside for a field show-up; appellant was not among them. A female Hispanic identified one of the men, who was arrested. The officers realized they were missing additional suspects.

No defense was presented, and the jury retired for deliberations on April 25, 2003.

Jury deliberations

The jury asked questions and requested readbacks. On April 29, 2003, the jury sent the following message to the judge: "The jury (minus) 1 party feels that we could reach a verdict. However, 1 person refuses to deliberate and does not agree with the application of the law. [¶] We'd like to proceed! [¶] Your direction is requested."

Juror No. 1 sent the following note: "My question is – Should I be here as a juror? I feel that I don't have enough evidence to make my verdict towards "guilty" & I have tried to explain my points to the best of my ability to the rest of the jury members; they don't agree with me. We keep going in circles. I have a lot of doubts. I ask you your Honor to listen to me. I feel that they want to replace me. They think I am not being rational that I don't want to accept the evidence and to follow the law. Even, I have heard comments that 'Is it because of your latin' (*sic*) because you did not want to he here' that you won't change your mind. If feel point out, I feel cornered. I am sorry but I am feeling that I am not being heard fairly. [¶] Thank you for your consideration, your honor. Juror No. 1."

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[7] Evidence supporting the gang allegation was presented at trial and is not at issue on appeal.

The court's response to the notes is at issue on appeal. As we now summarize, the trial court interviewed juror No. 1; called in defense counsel, who had been represented by another defense counsel; interviewed the jury foreperson, and then reinterviewed juror No. 1.

Faced with the two notes, the prosecutor asked the court to determine if juror No. 1 had been paying attention and saw the evidence, stating he had watched her and "when she didn't want to stay on the jury . . . she clammed down, closed her eyes, put her face down, never looked at the evidence." Counsel standing in for regular defense counsel noted that the prosecution had not used all its peremptory challenges on voir dire and the juror's note showed she wanted to be "part of the process;" he questioned if the other eleven jurors – or whichever juror made a comment about her ethnicity -- should be dismissed.[8]

The court explained to juror No. 1 that after she was sworn in, she expressed a reluctance to serve because of her other obligations, which "were determined not to be sufficient," and then asked her about her note, beginning "Should I be here?" The juror explained that she "made some arrangements," did not accept the 12-hour night shift, and came to be in court and listen to the evidence, which she had done. Questioned about whether she had seen the evidence, the juror stated "I mean sometimes you [the court] were writing on your computer, and I would be looking, and I looked at the evidence in the back room many many times." She closed her eyes during the female witness's testimony in order to better understand her.

The court inquired about whether the juror was "talking about the evidence with everyone." Juror No. 1 replied that they exchanged ideas, but she "just didn't believe" their position. Asked by the court if she could continue to deliberate, she replied in the affirmative but explained that they "keep going back and forth" and they don't want to

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[8] The court asked stand-in counsel to see the makeup of the jury before renewing that comment.

accept her position. At one point "they said that the only one that is stopping us is you, and I said go ahead, I mean go ahead and ask the judge, if he wants, and they actually said maybe we need to replace you. That's what they said."

The court explained that decision was up to the court and again asked if she was willing to proceed. The juror then replied "No" and stated "there are people that said just because you're Latin, that's why you're making that verdict, and I said no, and I felt like singled out because of that." The court admonished her against stating her view of the evidence and summarized juror No. 1's position presently as opposite from the other jurors and that she did not feel like she was being heard fairly. Asked again if she could "continue to deliberate" the juror expressed concern that the other were "not going to accept it." Specifically asked if she was willing to follow the court's directive and continue to deliberate, juror No. 1 replied "I don't want to go on."

Stand-in defense counsel then suggested calling in the foreperson; the court also called in regular defense counsel and explained the situation to him. The court characterized juror No. 1's response and "she said she's refusing to deliberate" but that the court was requesting further consideration from her. The foreperson, juror No. 2, was then called into court. The judge asked if there had been an comment that any juror had not been deliberating "because of their ethnicity." The foreperson said the question was asked, but by a person of the same ethnic background as juror No. 1, who did not respond. The foreperson stated that juror No. 1 said she did not agree with the law, changed her opinion on one count over the weekend, and would not respond to the questions of the other jurors "from day one." Moreover, the foreperson thought juror No. 1 "didn't want to be here from day one, and she's therefore failing to participate in the whole process."

The court allowed defense counsel and the prosecutor to ask the foreperson questions. The foreperson, juror No. 2, had been sitting by juror No. 1 all trial and, according to the foreperson juror No. 1 appeared to be asleep and took no notes. The foreperson felt juror No. 1 "was going [to] be an issue because she did not pay attention.

She could care less about this whole thing" and the foreperson was "trying to make eye contact with the judge" to bring juror No. 1's inattentiveness, perhaps sleeping during trial, to the court's attention.

Asked if juror No. 1 was crying, the foreperson stated that when she was first made to stay on the case "she cried a lot, but then I didn't see any crying after." However, while the other jurors bonded, juror No. 1 would "purposely move away from anybody else that is connected with this and walk on her own." Nevertheless, asked if the foreperson would be willing to work with juror No. 1, the foreperson stated "If she were willing to open up, we have no problem with working with her. We were trying to do that."

Juror No. 1 was again called in and told the court she had engaged in conversation freely about the case with the jurors and pointed out what she agreed with and what she did not agree with. She had no problem talking with anybody in the jury but felt she was not being heard by most of them. The court told juror No. 1 "as long as you're willing to talk, I'm going to indicate that I'd like you to please continue deliberating. Please step inside and continue deliberating. They've indicated they wish to proceed, so you can continue." Defense counsel, who wanted to keep the juror, made no objections to the court's manner of questioning juror No. 1.

The jury deliberated that afternoon. The following morning, juror No. 1 called twice and talked to the court clerk. Asked by the court to relate the conversation, the court clerk stated: "[Juror No. 1] stated she was sick today. She had been sick all night. I asked her if she felt that she might recover and be able to come in tomorrow, and she stated no, that it seemed like it would take several days to get over what ever it is she had, and she wanted to be replaced."

Defense counsel replied that "the only part of that statement I believe is the last phrase, which is I want to be replaced. I believe that she was stressed out by being the sole [dissenting] juror apparently, and she didn't want to be here. [¶] We knew from earlier in the trial, and now, she's decided to take matter into her own hands, just not

show up and say she's ill. Someone probably advised her to call in and say she's sick. [¶] I would like to have you bring out the foreperson, who was a very articulate woman yesterday and ask her what happened yesterday afternoon after you sent the jurors back in to deliberate, after juror No. 1 assured us she could deliberate, and I would like to know what happened. [¶] Because if there was something said or done toward this juror, I think that raises another specter, which we need to at least investigate briefly by asking the foreperson."

The prosecutor, who had believed the juror lied the day before about whether she had been paying attention, observed "now the defense says oh, we think she's lying [about being sick.]" That I find is very hard to believe, your honor. [¶] She calls in, says she's not going to be in the next few days. Either she's sick or refusing to deliberate. She's been crying like a baby. I can see why in many ways why this person something has happened to her either physically or emotionally. [¶] But either way, this juror is someone who cannot hold up the jury process for three days to come back in here . . . ."

The court stated "The court, at this point has no – at this point, I'm going to accept her – she actually didn't even look well. She hasn't even looked well physically all week to me. She didn't look well yesterday. And the fact that she's now – she is a nurse, the fact that she is now calling in saying she's ill and she cannot recover, she does not believe, tomorrow, so could you ask her if she could come back – did you explain that to her?"

The clerk replied: "Yes, your honor, she said she was vomiting overnight, she had a headache this morning, didn't know what was wrong, but she did not think she would be ready to come back tomorrow, or the next day for that matter, the rest of the week."

The court decided to "replace that particular juror and not do any further inquiry."[9]

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9 Denying the defense motion for further inquiry, the court stated the jury had deliberated only "for a very short – 10 minutes" the previous afternoon and "there was not much time [for anything] to have occurred."

The court replaced juror No. 1 with an alternate, and the jury began its deliberations anew.[10] The jury reached its verdicts later that same day.

CONTENTIONS ON APPEAL

Appellant contends: 1. The judgment must be reversed because the trial court, with knowledge of her position that appellant was not guilty, coerced a juror to leave the jury, then wrongfully dismissed her, thus depriving appellant of due process and a verdict by a unanimous jury guaranteed by the Fifth, Sixth and Fourteenth amendments to the United States Constitution and by Article I, sections 15 and 16 of the California Constitution. 2. To the extent that counsel waived objection to the court's improper examination of juror #1, or to her discharge, appellant received ineffective assistance. 3. The judgment of conviction for attempted voluntary manslaughter must be reversed because the trial court erred in instructing the jury that the crime of attempted voluntary manslaughter may be committed by a perpetrator who "either intended to kill the victim, or acted in conscious disregard for life."[11]

DISCUSSION

1. The trial court did not coerce the juror to leave the jury, nor was the juror wrongfully dismissed.

Appellant contends that the trial court coerced the juror to leave and improperly dismissed her without a requisite hearing about her illness. Moreover, appellant contends that jeopardy attached and the appropriate remedy is dismissal. We need not reach the issue of remedy because we conclude that the trial court acted properly.

A handwritten note on the foreperson's jury question about juror No. 1 reads: "Juror No. 1 went out ill & was replaced on 4-30-03." Similarly, "This Juror went out ill and was replaced on 4-30-03" was written on juror No. 1's note to the judge.

[10] Another juror had earlier been replaced because he was going on a business trip. Defense counsel had no objection to the replacement of that juror.

[11] Respondent concedes prejudicial error. (*People v. Montes* (2003) 112 Cal.App.4th 1543.)

a. Coercion

Penal Code section 1089 provided in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, *a juror dies or becomes ill*, *or upon other good cause shown to the court is found to be unable to perform his duty*, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." (See also Code Civ. Proc., § § 233, 234.)[12]

In *People v. Cleveland* (2001) 25 Cal.4th 466, 474-475, affirming the Court of Appeal's reversal of a criminal conviction for wrongful discharge of a juror, Chief Justice George explained both the most common application of Penal Code section 1089 as well as the caution that must be exercised by the trial court in making a determination that a juror has refused to deliberate: "The most common application of these statutes permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1100 [31 Cal.Rptr.2d 321, 875 P.2d 36] [anxiety over new job would affect deliberations]; *People v. Johnson* (1993) 6 Cal.4th 1 [23 Cal.Rptr.2d 593, 859 P.2d 673] [sleeping during trial]; *People v. Espinoza* (1992) 3 Cal.4th 806, 821 [12 Cal.Rptr.2d 682, 838 P.2d 204] [sleeping during trial]; *People v. Dell* (1991) 232 Cal.App.3d 248 [283 Cal.Rptr. 361] [juror involved in automobile accident]; *Mitchell v. Superior Court* (1984)

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12 Recent amendments to section 1089 have changed the pertinent language slightly: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (Added by Stats.1895, c. 213, p. 279, § 1. Amended by Stats.1927, c. 630, p. 1063, § 2; Stats.1933, c. 521, p. 1342, § 1; Stats.1949, c. 1312, p. 2300, § 1; Stats.1963, c. 721, p. 1729, § 2; Stats.2002, c. 784 (S.B.1316), § 545; Stats.2003, c. 62 (S.B.600), § 230.)

155 Cal.App.3d 624, 629 [202 Cal.Rptr. 284] [inability to concentrate]; *In re Devlin* (1956) 139 Cal.App.2d 810, 812-813 [294 P.2d 466] [juror arrested on felony charge], disapproved on another ground in *Larios v. Superior Court* (1979) 24 Cal.3d 324, 333 [155 Cal.Rptr. 374, 594 P.2d 491].)

"These statutes also have been applied to permit the removal of a juror who refuses to deliberate, on the theory that such a juror is 'unable to perform his duty' within the meaning of Penal Code section 1089. In *People v. Thomas* (1994) 26 Cal.App.4th 1328 [32 Cal.Rptr.2d 177], the Court of Appeal upheld the dismissal of a juror who refused to deliberate, stating: 'The juror did not answer the questions posed to him by other jurors, did not sit at the table with the other jurors during deliberations, acted as if he had already made up his mind before hearing the whole case, and did not look at the two victims in the courtroom. As the court concluded, Juror Bailey "made up his mind before he went in there."' (*Id*. at p. 1333.)

"But caution must be exercised in determining whether a juror has refused to deliberate. California courts have recognized the need to protect the sanctity of jury deliberations. (*People v. McIntyre* (1990) 222 Cal.App.3d 229, 232, fn. 1 [271 Cal.Rptr. 467] ['The secrecy of jury deliberations should be closely guarded']; *People v. Talkington* (1935) 8 Cal.App.2d 75, 85-86 [47 P.2d 368] [recognizing 'the secrecy that should surround the deliberations of the jury'], disapproved on another ground in *People v. Friend* (1958) 50 Cal.2d 570, 578 [327 P.2d 97].) Penal Code section 167 makes it a misdemeanor to eavesdrop upon or record jury deliberations without the jury's consent. Under Evidence Code section 1150, once a verdict has been rendered, it can be impeached with evidence of misconduct, but evidence of the jurors' mental processes is inadmissible. One reason for this rule is to 'protect[] the stability of verdicts,' an interest that does not apply in the present case because the inquiry was conducted before a verdict had been rendered. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350 [78 Cal.Rptr. 196, 455 P.2d 132].) But an additional reason that does apply here is to '"assure[] the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought

processes." [Citation.]' (*In re Hamilton* (1999) 20 Cal.4th 273, 294, fn. 17 [84 Cal.Rptr.2d 403, 975 P.2d 600].)" (Fn. omitted.) Moreover, a juror's inability to perform as a juror must "appear in the record as a demonstrable reality." (*People v. Williams* (2001) 25 Cal.4th 441, 447-448; *People v. Cleveland*, *supra*, 25 Cal.4th 466, 473.)

The trial court in the case at bench must have had the fine line of permissible inquiry outlined in *Cleveland*, *supra*, 25 Cal.4th 466, 476-487, in mind when it made inquiry of juror No. 1 and the foreperson. We have reviewed the court's conversations and find no coercion of juror No. 1. Rather, the record reveals an honest effort to discern if juror No. 1 was deliberating and/or was intimidated by other jurors. Juror No. 1 did not want to continue; defense counsel wanted to keep her on the jury;[13] and the trial court determined the juror had a different view of the evidence than the other jurors but was deliberating and could continue to deliberate. "[W]e do not believe the court's remarks, viewed as a whole, had a coercive connotation." (*People v. Burgener* (2003) 29 Cal.4th 833, 879; see also *People v. Boyette* (2002) 29 Cal.4th 381, 456-457 [discouraging certain prosecutorial comments regarding deferring to jurors who were more "street smart" but concluding no prejudicial error].)

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13 Defense counsel realized that juror No. 1 was voting for acquittal and therefore did not want to lose her. Any lack of objection to the trial court's method of inquiry was therefore likely a tactical choice. In any event, we find the inquiry to be permissible and not erroneous.

b. Dismissal for illness

Appellant next argues that the trial court erred in dismissing juror No. 1 for illness, without further inquiry, when she called in sick. If the juror had fallen ill while in the courthouse, the court could have made inquiry on the record. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 231 [inquiry into whether juror would be physically able to continue]; accord *People v. Lanigan* (1943) 22 Cal.2d 569, 577 [report from physician and interview of juror with intestinal distress whose "illness was due in some degree to the nervous strain of the deliberations"].)

Where the need arises when the juror is not at the courthouse, inquiry may be made by telephone (*People v. Roberts* (1992) 2 Cal.4th 271, 325 ["Here the court did its duty by telephoning the ill juror, discussing the matter on the record with counsel, and stating its reasons"]; (*People v. Bell* (1998) 61 Cal.App.4th 282, 286-288, [only African-American male juror dismissed for cause where he had to take his son to the doctor for an unspecified medical emergency that might take only the morning; telephone call was to the court clerk].) At times, counsel will stipulate to the dismissal of an ill juror. (*People v. Seaton* (2001) 26 Cal.4th 598, 638 [juror said she had been "throwing up everything" and needed rest; after she appeared to be improving, counsel stipulated to her dismissal].)

Although it might have been preferable to have held a hearing,[14] to force an ill juror into court is not a reasonable solution, unless the court has reason to believe the juror is lying. "When the juror is not present in the courtroom it would appear

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14 "California cases construing these statutes have established that, once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated. (*People v. Tinnin* (1934) 136 Cal.App. 301, 318-319, [28 P.2d 951]; *People v. Abbott* (1956) 47 Cal.2d 362, 371 [303 P.2d 730]; *People v. Manriquez* (1976) 59 Cal.App.3d 426, 432 [130 Cal.Rptr. 585], cert. den., 429 U.S. 1003 [50 L.Ed.2d 615, 97 S.Ct. 536].) Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. [Citations].)" (*People v. Burgener* (1986) 41 Cal.3d 505, 519-520, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743.)

unreasonable to require the sick or hospitalized juror to come into the courtroom in order to hold a hearing to substantiate the factual basis for the juror's claim of illness" and requiring such a hearing " 'would have been pointless and perhaps callous.' " (*People v. Dell* (1991) 232 Cal.App.3d 248, 255-256.) In addition, "The court's observation of the juror's appearance is a sufficient basis to determine the juror is too ill to continue. [Citation.]" (*Ibid*.)

As in *People v. Dell* (1991) 232 Cal.App.3d 248, 255-256, footnote 2, "We recognize it would have been a more appropriate procedure for the trial court to have communicated directly with the ill [juror or her physician] prior to its determination the [juror was] too ill to continue deliberations." Nevertheless, the court's view of the juror corroborating her ill appearance during the trial is sufficient to justify the juror's dismissal for illness following a phone conversation with the clerk that the juror, a nurse, had been vomiting all night and did not expect to be able to return at least within the next three days.

Given the juror's obvious reluctance to serve from the outset, we are concerned about the juror's calling in sick the day after the court had interviewed her about the note she sent and her ability to deliberate. The standard of review has been alternatively stated to be that the juror's inability to perform must "appear in the record as a demonstrable reality" (*People v. Cleveland*, *supra*, 25 Cal.4th 466, 474 (majority) 488 (Werdegar, J,. Conc. opn) or the traditional review "for abuse of discretion" (*ibid*). Under either test, we conclude that there was no error in discharging the juror in the case at bench without holding a further hearing regarding either her illness or the jury's conduct in the ten minutes it had deliberated the day before following the court's interviews with juror No. 1 and the foreperson.

Despite the prosecution's view that juror No. 1 had paid no attention during trial and was not deliberating, the trial court did not dismiss her the day before juror No. 1 called in sick. Rather, the court expressed its view that the jurors had been deliberating, although with differing views, and could continue that process. If juror No. 1 was in fact

ill, throwing up, and unable to attend trial for the next few days, which the trial court was entitled to believe, there was good cause to dismiss her pursuant to Penal Code section 1089. If she was lying to the court about her health and/or her ability, past and present, to participate in the deliberative process, that too would be grounds for dismissal.

Because we conclude there was no error by the trial court, failure of counsel to object, if any, could not under any circumstances have made a difference. We therefore need not discuss the issue of ineffective assistance of counsel.

2. The conviction of attempted voluntary manslaughter must be reversed.

Respondent concedes the instructions given were erroneous (see *People v. Montes* (2003) 112 Cal.App.4th 1543) and prejudicial.

DISPOSITION

The judgment of conviction as to count 1 and related allegations is affirmed, and judgment of conviction as to count 2 (relating to victim Jaime Garcia) is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.